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Order 2000-7-23

Served: July 19, 2000



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 19th day of July, 2000

Fitness determination of

FARWEST AIRLINES, LLC

as a commuter air carrier under 49 U.S.C. 41738

Docket OST-00-7152 - 10

**ORDER TO SHOW CAUSE
PROPOSING ISSUANCE OF COMMUTER AIR CARRIER AUTHORITY**

Summary

By this order, we tentatively find that Farwest Airlines, LLC (Farwest) is fit, willing, and able to conduct commuter air carrier operations.

Background

Section 41738 of Title 49 of the United States Code (Transportation) ("the Statute") directs us to determine whether companies proposing to provide scheduled passenger service as commuter air carriers are "fit, willing, and able" to perform such service, and to ensure that all operations relating to this service conform to the safety standards established by the Federal Aviation Administration (FAA). In making fitness findings, the Department uses a three-part test that reconciles the Airline Deregulation Act's liberal entry policy with Congress' concern for operational safety and consumer protection.¹ The three areas of inquiry that must be addressed in order to determine a company's fitness are whether the applicant (1) will have the managerial skills and technical ability to conduct the proposed operations, (2) will have access to financial resources sufficient to commence operations without posing an undue risk to consumers, and (3) will comply with the Statute and regulations imposed by federal and state agencies. We must also determine that the applicant is a U.S. citizen.

¹ Part 204 of our rules sets forth the evidence we need to make fitness findings.

On March 28, 2000, Farwest Airlines, LLC, an air taxi operator based in Chandler, Arizona, submitted an application in Docket OST-00-7152 to conduct scheduled passenger operations as a commuter air carrier.² Upon review of the information in the application and the safety and compliance information on the carrier received from the FAA and the National Transportation Safety Board (NTSB), we tentatively conclude that the applicant is a U.S. citizen and has met the fitness test to conduct commuter operations. We will, however, give interested persons an opportunity to show cause why we should not adopt as final the tentative determination that Farwest is fit, willing, and able to provide commuter service.

The Carrier

Farwest is a Limited Liability Company organized on April 1, 1998, under the laws of the State of Arizona by Mr. Max L. Biegert. It received authority to operate as an air taxi under Part 298 of our rules in June 1999 and has been conducting on-demand operations to Flagstaff and the Grand Canyon area ever since. Farwest is owned by FWA Investors (87 percent), Biegert Aviation (1 percent), James C. Jefferies (10 percent), and David Berry (2 percent). FWA Investors and Biegert Aviation are wholly owned by Max and Thelma Biegert.

If granted the commuter air carrier authority requested here, Farwest plans to provide scheduled passenger service between Las Vegas and the Grand Canyon National Park and between Las Vegas and Flagstaff using its existing fleet of three 50-seat DHC-7 aircraft.³

Managerial Competence

In addition to being one of Farwest's owners, Mr. Biegert is the company's Chief Executive Officer. His extensive business experience goes back to 1957 when he founded and became Chief Executive Officer of Biegert Aviation, Inc., a company that specializes in worldwide heavy aircraft spraying. Mr. Biegert also has extensive experience in the real estate construction business, having built various medical office buildings. Mr. Biegert also founded, built, and operated a national chain of day care centers consisting of sixty centers in five different states from 1970 to 1980. In 1987, Mr. Biegert purchased all assets of the Grand Canyon Railway in Arizona which presently carries over 160,000 people a year to the Grand Canyon. He founded

² Farwest supplemented its application with additional fitness information on May 4 and May 22. The company requested that some sections of its application and May 4 supplement be granted confidential treatment pursuant to 14 C.F.R. 302.12. After a careful evaluation of the information submitted, by letter dated July 3, 2000, we advised the applicant that only information regarding its owner's personal bank account would be accorded confidential treatment. As a result, on July 7, the applicant resubmitted in the public portion of the docket the financial documents for which it had requested and been denied confidential treatment.

³ Prior to being authorized to provide commuter service, Farwest must obtain amended Operations Specifications from the FAA authorizing it to conduct scheduled passenger service as a commuter, and must meet the insurance requirements for commuter operations as contained in section 205.5(b) of our regulations.

Farwest mainly to facilitate the flow of tourists to the Grand Canyon area. In addition to serving as Farwest's CEO, Mr. Biegert holds similar positions with Biegert Aviation, the Grand Canyon Railway (a position he has held since 1987), and the Fray Marcos Hotel (a position he has held since 1994).

Mr. James C. Jefferies, an Airline Transport Pilot, serves as Farwest's President and General Manager and is responsible for overseeing the applicant's day-to-day operations. Between 1970 and 1980, Mr. Jefferies worked for various companies including Aviation Specialties, Globe Air, and Helitec Corporation where he held positions of increasing responsibility, first as a pilot, and later, as project electrical engineer, Executive Vice President, and project manager for large aircraft agricultural operations. Prior to joining the applicant, Mr. Jefferies served for eighteen years as President and General Manager of Biegert Aviation.

Mr. David F. Berry serves as Farwest's Assistant General Manager, Executive Vice-President and Director of Safety. Mr. Berry's aviation career began in 1978 when he joined Globe Air as a maintenance technician. Upon his departure in 1980, Mr. Berry joined Biegert Aviation, where he has held positions ranging from aerial application to Director of Operations, Director of Maintenance, and Chief Inspector. Mr. Berry holds an Airframe and Powerplant Mechanic License from the FAA.

Mr. Cody J. Diekroeger serves as Farwest's Director of Operations. Mr. Diekroeger began his aviation career in 1979 with Conroe Jet Charter, a Part 135 company, as a flight instructor and pilot. After his departure from Conroe in 1981, Mr. Diekroeger served as a Captain with Continental Express/Rocky Mountain Airways for 12 years and a manager of training, flight instructor, and Chief Pilot with various air taxi and fixed base operators for three years. In 1994, Mr. Diekroeger founded Maverick Airways, a certificated carrier, serving as its Chief Executive Officer and President until 1997. Since then, Mr. Diekroeger has worked for Aspen Mountain Air as base flight manager, in addition to working as Chief Pilot for Mayo Aviation, an air taxi operator, and a pilot for Frontier Airlines. Mr. Diekroeger holds an FAA-issued Airline Transport Pilot license certificate.

Mr. James G. Jordan, an Airframe and Powerplant Mechanic, serves as Farwest's Director of Maintenance. Mr. Jordan's airline maintenance experience began with his employment in 1972 as a mechanic with Ross Aviation where he has worked for most of his career. In addition, for approximately five years, Mr. Jordan worked as a helicopter mechanic for Petroleum Helicopters.

Mr. Michael D. Glow, an Airline Transport Pilot with over 6,000 hours of flying time, serves as Farwest's Chief Pilot. Mr. Glow began his flying career when employed by LAB Flying Service as a Line Pilot in 1986. In 1987 he joined Comstock Air Services, a charter company operating in the Western U.S. as a charter pilot. From 1988 until 1995, Mr. Glow was a pilot with Westair Commuter. Prior to joining the applicant in his present capacity, Mr. Glow was a pilot with Native American Air Ambulance.

Mr. Mark D. Katz serves as Farwest's Director of Quality Control. Mr. Katz's first aviation employment was with Tower Air as a Quality Control Representative in 1987. Since that time, he has held quality control positions with Evergreen International, Trump Shuttle, and GMG Aerospace. In addition, for the year preceeding his employment with the applicant, Mr. Katz served as Director of Maintenance for Sun Pacific International. Mr. Katz holds an Airframe and Powerplant Mechanic license from the FAA.

In view of the experience and background of the applicant's key personnel, we tentatively conclude that Farwest has demonstrated that it has the management skills and technical ability to conduct its proposed service.⁴

Financial Plan and Operating Proposal

If granted the commuter authority it seeks, Farwest intends to provide scheduled passenger air transportation using its existing fleet of three 50-seat DHC-7 aircraft. The applicant intends to begin service by offering a total of four daily round-trip flights during the summer season: two round-trips between Las Vegas and Flagstaff and two-round trips between Las Vegas and the Grand Canyon National Park Airport. During the winter months, Farwest will offer two daily flights over a Las Vegas-Grand Canyon-Flagstaff-Las Vegas routing.

Farwest provided financial statements which included balance sheets as of December 31, 1998 and 1999, and income statement information for calendar years 1998 and 1999. It also furnished detailed projections of anticipated operating revenues and expenses for its first year of scheduled passenger operations, as well as a listing of its anticipated pre-operating expenses.

A review of the Farwest's financial statements indicates that, while the company experienced an operating loss of \$779,349 during calendar year 1998 and \$2.9 million during calendar year 1999, its December 31, 1999, balance sheet showed \$6.2 million in assets, \$5.1 million in liabilities and positive stockholders' equity of \$1.1 million. The carrier had a current asset to current liabilities ratio of 1:1.

In evaluating an applicant's financial fitness, the Department generally asks that the company have available to it resources sufficient to cover all pre-operating costs plus a working capital reserve equal to the operating costs that would be incurred in three months of normal commuter operations. Based on the forecasts provided, Farwest anticipates that pre-operating expenses will amount to \$789,000 and that total first-year operating expenses will be \$5.6 million. We have reviewed the applicant's projections and find them to be reasonable. Based on this evaluation, it appears that Farwest will need approximately \$2.2 million to meet our

⁴ Before authorizing a carrier to conduct air transportation operations, the FAA also evaluates certain of the carrier's key personnel with respect to the minimum qualifications for those positions as prescribed in the Federal Aviation Regulations. The FAA's evaluation of these key personnel provides an added practical and in-person test of the skills and technical ability of these individuals.

financial fitness criteria.⁵ In addition to its own internal resources, Farwest will have access to funding from its majority owner, Mr. Max L. Biegert. Mr. Biegert has stated that he is willing to provide the applicant funds in the amount of \$3.1 million to sustain Farwest's operations, should it become necessary. Third-party verification that Mr. Biegert has such funds available to him was provided by Banc One Securities Corporation.

In consideration of the above, we tentatively conclude that Farwest will have access to financial resources sufficient to enable it to commence its proposed operations without posing an undue risk to consumers or their funds.

Compliance Disposition

The applicant states that there have been no charges of fraud, felony or antitrust violations, or of unfair, anticompetitive or deceptive business practices filed against it or any of its owners or key personnel, nor are there any outstanding judgments against any of these parties. Farwest further states that neither it nor any of these parties are the subject of any pending investigations, formal complaints or enforcement actions regarding compliance with the Statute or the Federal Aviation Regulations.

Moreover, our search of the Department's records found no compliance problems involving the company, its owners, or its key personnel. Further, a search of FAA and NTSB records confirms that Farwest has had no FAA enforcement actions taken against it, nor has it been involved in any accidents or incidents. Finally, the FAA has advised us that the company has applied to obtain Amended Operations Specifications authorizing the proposed scheduled passenger operations, and that it has no objections to the Department's grant of Farwest's request for commuter authority.

CITIZENSHIP

49 U.S.C. 41102 requires that authority to engage in air transportation be held only by citizens of the United States as defined in 49 U.S.C. 40102(a)(15). That section requires that the president and two-thirds of the Board of Directors and other managing officers be U.S. citizens and that at least 75 percent of the outstanding voting stock be owned by U.S. citizens. We have also interpreted the Statute to mean that, as a factual matter, the carrier must actually be controlled by U.S. citizens.

⁵ This figure is comprised of Farwest's pre-operating expense forecast of \$789,000 plus \$1.4 million which is one-quarter of its anticipated total first-year operating expense estimate of \$5.6 million. Because projected expenses during one or more of the first several months of service frequently do not include all costs of operations that will be incurred during a normal period of operations, it is our practice to base our three-months test on one quarter of the first year's operating cost forecast. In calculating available resources, projected revenues may not be used.

Farwest's owners and key personnel are all U.S. citizens and the company has provided an affidavit attesting that it is a citizen of the United States within the meaning of section 40102(a)(15). Moreover, there is nothing in the record that would lead us to conclude that control of this applicant is not with United States citizens.

In view of the foregoing, we tentatively conclude that Farwest is a U.S. citizen and that it is fit, willing, and able to provide the scheduled passenger service it proposes as a commuter air carrier.

OBJECTIONS

We will give interested persons 14 calendar days following the service date of this order to show cause why the tentative findings and conclusions set forth here should not be made final; answers to objections will be due within 7 calendar days thereafter. We expect such persons to direct their objections, if any, to the application and points at issue and to support such objections with detailed economic analyses. We will not entertain general, vague, or unsupported objections. If no substantive objections are filed, we will enter an order making final our tentative findings and conclusions with respect to Farwest's fitness and commuter authority.

EFFECTIVE COMMUTER AUTHORIZATION CONDITIONS AND LIMITATIONS

In the event that we find Farwest fit, willing, and able to conduct the proposed scheduled service, we will issue to it a Commuter Air Carrier Authorization. However, that authorization will not become effective until the company has fulfilled all of the requirements for effectiveness as set forth in the Terms, Conditions, and Limitations attached to it. Among other things, this includes our receipt of evidence that Farwest has received amended Operations Specifications from the FAA authorizing it to conduct commuter operations, and evidence of liability insurance coverage that meets the requirements of section 205.5(b) of our rules.

Furthermore, we remind Farwest of the requirements of 49 U.S.C. 41110(e). Specifically, that section requires that, once a carrier is found fit initially, it must remain fit in order to hold its authority. To be assured that commuter air carriers continue to be fit after effective authority has been issued to them, we require that they supply information describing any subsequent substantial changes they may undergo in areas affecting fitness. Our conclusion as to Farwest's fitness is based on the operating plans described in the application. Our fitness findings might no longer apply if the carrier were to substantially change the scope of its operations through the introduction of additional aircraft. Therefore, if Farwest is found fit and issued effective commuter authority, should it propose to expand its fleet to include the operation of more than four aircraft, it must notify the Department in writing at least 45 days in advance and demonstrate its fitness for such operations prior to implementing service with such additional aircraft.⁶ Furthermore, should Farwest propose any substantial changes in its ownership,

⁶ Based on our analysis of Farwest's current financial condition and available funding from its owners, we believe that it has sufficient resources to add a fourth aircraft to its fleet, should it so desire.

management or operations, it must first comply with the requirements of section 204.5 of our regulations.⁷ The compliance of the company with these requirements is essential if we are to carry out our responsibilities under the Statute.⁸

ACCORDINGLY,

1. We direct all interested persons to show cause why we should not issue an order finding that Farwest Airlines, LLC, is fit, willing and able under 49 U.S.C 41738 to provide scheduled passenger service as a commuter air carrier.
2. We direct any interested persons having objections to the issuance of an order making final any of the proposed fitness findings set forth here to file such objections with Department of Transportation Dockets, 400 Seventh Street, SW, Room PL-401, Washington, D.C. 20590, in Docket OST-00-7152, and serve them on all persons listed in Attachment A no later than 14 calendar days after the service date of this order. Answers to objections shall be filed no later than 7 calendar days thereafter.
3. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action.⁹
4. In the event that no objections are filed, we will deem all further procedural steps waived, and we will enter an order making the tentative findings and conclusions set forth here and awarding Farwest Airlines, LLC, a Commuter Air Carrier Authorization, subject to the attached specimen Terms, Conditions, and Limitations.
5. We will serve a notice of this order on the persons listed in Attachment A.

⁷ Farwest may contact our Air Carrier Fitness Division to report proposed substantial changes in its operations, ownership, or management, and to determine what additional information, if any, will be required under section 204.5. If the carrier fails to file the information or if the information fails to demonstrate that the carrier will continue to be fit upon implementation of the substantial change, the Department may take such action as is appropriate, including enforcement action or steps to modify, suspend, or revoke the carrier's commuter authority.

⁸ We also remind Farwest about the requirements of section 204.7 of our rules. This section provides, among other things, that (1) the commuter authority granted to a company shall be revoked if the company does not commence actual flying operations under that authority within one year of the date of the Department's determination of its fitness; (2) if the company commences operations for which it was found fit and subsequently ceases such operations, it may not resume commuter operations unless its fitness has been redetermined; and (3) if the company does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

⁹ Since we have provided for the filing of objections to this order, we will not entertain petitions for reconsideration.

6. We will publish a summary of this order in the Federal Register.

By:

A. BRADLEY MIMS
Acting Assistant Secretary for
Aviation and International Affairs

(SEAL.)

*An electronic version of this document is available on the World Wide Web at:
<http://dms.dot.gov>.*



SPECIMEN

Terms, Conditions, and Limitations

FARWEST AIRLINES, LLC

is authorized to engage in scheduled passenger air transportation operations as a commuter air carrier.

This authority is subject to the following provisions:

- (1) The authority to conduct scheduled passenger operations will not become effective until six (business) days after the Department has received the following documents; provided, however, that the Department may stay the effectiveness of this authority at any time prior to that date:*
 - (a) A copy of the holder's Air Carrier Certificate and Operations Specifications authorizing such operations from the Federal Aviation Administration (FAA).*
 - (b) A certificate of insurance on OST Form 6410 evidencing liability insurance coverage meeting the requirements of 14 CFR 205.5(b) for all of its aircraft.*
 - (c) A statement of any changes the holder has undergone in its ownership, key personnel, operating plans, financial posture, or compliance history, since the date of the Show Cause Order in this case.*
 - (d) A revised list of pre-operating expenses already paid and those remaining to be paid, as well as independent verification that the holder has available to it funds sufficient to cover any remaining pre-operating expenses and to provide a working capital reserve equal to the operating costs that would be incurred in three months of operations.*
- (2) Pending receipt of effective authority, the holder may not accept payment of any kind (i.e., cash, check, or credit card), or issue tickets for scheduled passenger operations, and any advertisement/or listing of flights by the holder must prominently state: "This service is subject to receipt of government operating authority."*
- (3) The holder shall at all times conduct its operations in accordance with the requirements of 14 CFR Part 298 and any other regulations prescribed by the Department of*

Transportation for the services authorized here, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.

(4) The holder's authority is effective only to the extent that such operations are also authorized by the FAA.

(5) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102(a)(15).

(6) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render the authority ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this authority.

(7) The holder shall maintain in effect at all times with the Department of Transportation current information on QST Registration Form 4507.

(8) The holder may not provide scheduled passenger air transportation to or from Dallas (Love Field), Texas, except within the limits set forth in section 29 of the International Air Transportation Competition Act of 1979, as amended by section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998.

(9) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.

(10) In the event that the holder does not commence actual flying operations as a commuter air carrier under this authority within one year of the date of the Department's determination of its fitness, its commuter authority shall be revoked for dormancy. Further, in the event that the holder commences but subsequently ceases all scheduled passenger operations, the authority granted here shall be suspended under the terms of 14 CFR 204.7 and the holder may neither recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume such operations within one year of its cessation, its commuter authority shall be revoked for dormancy.

SERVICE LIST FOR FARWEST AIRLINES, LLC

Mr. James C. Jefferies
President
Farwest Airlines, LLC
Memorial Airfield
22022 So. Old Price Rd.
Chandler, AZ 85248-4600

Mr. Pierre Murphy
Ms. Elizabeth C. Collins
Law Offices of Pierre Murphy
One Westin Center
2445 M St., N.W., Ste. 260
Washington, D.C. 20037

Mr. Richard Dutton
Assistant Manager CSET AFS-900
Federal Aviation Administration
4500 Aviation Drive, Ste. 203B
Dulles, VA 20166-7537

Mr. Peter Lynch AGC-300
Assistant Chief Counsel for
Enforcement
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D.C. 20591

Ms. Maryellen Clinkingheard
FAA Phoenix FSDO
2800 N. 44th Street, Ste. 450
Phoenix, AZ 85008-1561

Mr. David C. Gilliom
Manager
Flight Standards Division
FAA AWP-200
1500 Aviation Blvd.
Hawthorne, CA 90261

American Association of
Airport Executives
4224 King Street
Alexandria, VA 22302

Ms. Joni Mount
Product Manager
Official Airlines Guides
2000 Clearwater Drive
Oak Brook, IL 60521

Mr. Jim Zammar
Director of Revenue Accounting
Air Transport Association
Ste. 1100
1301 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Mr. Allan Muten
Assistant Treasurer
Airlines Reporting Corp.
1530 Wilson Blvd., Ste. 800
Arlington, VA 22209

Mr. Monroe Balton
Regional Counsel
FAA AWP-7
15000 Aviation Blvd.
Hawthorne, CA 90261

Mr. JD Mealor
Airline Data Coordinator
INNOVATA, LLC
3915 Old Mundy Mill Rd.
Oakwood, GA 30566-3410

Mr. Donald Bright
Office of Airline Information
U.S. Dept. of Transportation
400 7th St., S.W.
Washington, D.C. 20590